

KINNARD MEDIATION CENTER
UNITED STATES COURT OF APPEALS
ELEVENTH JUDICIAL CIRCUIT

Mediation and Guidelines for Effective Mediation Representation

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PART 1: Introduction

The Eleventh Circuit's mediation program was created in 1992. Formerly known as the Circuit Mediation Office, in 2001 the Eleventh Circuit designated the office as the Kinnard Mediation Center (KMC) in recognition of Stephen O. Kinnard's (its first chief circuit mediator) extraordinary service in making mediation a fundamental component of the Eleventh Circuit's appeals process.

The KMC conducts mediation of civil appeals pursuant to Federal Rule of Appellate Procedure 33 and Eleventh Circuit Rule 33-1. The court's mediation process provides confidential, risk-free opportunities for parties to resolve their dispute with the help of a neutral third-party. Each year hundreds of appeals are resolved through the mediation program.

The KMC's circuit mediators are full-time employees of the Eleventh Circuit and have extensive trial and appellate experience as well as significant training and experience in mediation. The circuit mediators are located in Atlanta, Tampa, and Miami.

Pursuant to Rule 33-1(g), a private mediator may be employed by the parties, at their expense, to mediate an appeal that has been selected for mediation by the KMC. The private mediator will conduct the mediation under the procedures set forth by the KMC, and the assigned circuit mediator will provide assistance as specified in those procedures. Information about substituting a private mediator is in the document "Private Mediator Procedures for Mediation of Appeals."

PART 2: Eligible Appeals

All fully counseled civil appeals, except prisoner, habeas corpus, and immigration appeals, are eligible for mediation conducted by the KMC. Certain categories of eligible but low-expectation appeals may be excluded from assignment to adjust the total universe of covered appeals to the capacity of the mediator staff to mediate cases.

PART 3: Selection Process

Eligible appeals are sorted by district and rotationally assigned to the circuit mediators. The circuit mediators review each assigned appeal before scheduling it for mediation and may remove an appeal from the mediation program based on a procedural reason or a discretionary reason.

The KMC, an active or senior judge of the court of appeals, or a hearing panel of judges, either before or after oral argument, may direct counsel and parties in an appeal to participate in mediation conducted by the KMC. Counsel for any party may confidentially request mediation in eligible appeals by calling the KMC. Such requests are not disclosed by the KMC to opposing counsel without permission of the requesting party.

PART 4: Documents Reviewed

The Civil Appeal Statement, accompanied by required portions of the record, the notice of appeal, the district court and court of appeals dockets, and, in appeals scheduled for mediation, the required Confidential Mediation Statements of counsel provide the KMC with the information necessary for an understanding of the nature of the appeal.

PART 5: Scheduling Process

The KMC sends written notice of the initial mediation to lead counsel, to be received at least two weeks before the mediation date. The KMC schedules most mediations soon after court of appeals docketing. Participation in the mediation is mandatory; however, if the parties consult and all agree that mediation would not be productive, they may contact the circuit mediator handling the appeal to discuss changing the scheduled mediation date to a half-hour assessment conference. The decision to change the scheduled mediation to an assessment conference rests with the circuit mediator. **If counsel files a joint or unopposed motion to dismiss the appeal before the mediation, counsel should call the KMC to cancel the mediation.**

PART 6: Mediation Process

Initial mediations are conducted in person and by telephone. If counsel are located in the Atlanta area, Tampa area, or Miami area, the initial mediation will usually be held in person at the KMC. If counsel are noticed for a telephone mediation, but all parties prefer to have an in-person mediation, counsel may call the circuit mediator to discuss a change.

The circuit mediator begins the mediation by discussing confidentiality, and inquiring whether any procedural questions or problems can be resolved by agreement. The parties and the circuit mediator then discuss, either jointly or separately, and in no particular order, the following topics: (1) the legal issues and the appellate court's decision-making process; (2) the history of any efforts to settle the case; (3) the parties' underlying interests, preferences, motivations, assumptions, and new information or other changes that may have occurred; (4) future events based upon the various outcome alternatives of the appeal; (5) how resolution of the appeal impacts the underlying problem; (6) cost-benefit and time considerations; (7) any procedural alternatives possibly applicable to the appeal (e.g., vacatur, remand, etc.). The discussion is not limited to these topics and varies considerably because each appeal has its own circumstances. The circuit mediator also attempts to generate offers and counteroffers and may have several follow-up mediation sessions by telephone or in person until the case settles or it is decided the case will not settle.

Because circuit mediation is based on the principles of self-determination by the parties and impartiality of the neutral, the circuit mediators apply the facilitative model of mediation.

Counsel should allow two hours for initial telephonic mediations; from four hours to all day for initial in-person mediations; and from 30 minutes to one hour for follow-up mediation sessions. To pursue fully all opportunities of negotiated settlement, there is extensive follow-up activity such as additional telephone calls, in-person sessions, or caucuses with each side separately.

PART 7: Party Participation

Rule 33-1(c)(1) requires that counsel must, except as waived by the mediator in advance of the mediation date, have the party available during the mediation. Should waiver of party availability be granted by the circuit mediator, counsel must have the authority to respond to settlement proposals consistent with the party's interests. The circuit mediator may require the physical presence of the party in an in-person mediation or the telephone participation of the party in a telephone mediation. For a governmental or other entity for which settlement decisions must be made collectively, the availability, presence, or participation requirements may be satisfied by a representative authorized to negotiate on behalf of that entity and to make recommendations to it concerning settlement.

The KMC attempts to identify lead counsel for all parties when scheduling a mediation. Counsel should promptly advise the Center if the purposes of the mediation would be accomplished more effectively with different or additional attorneys or participants.

PART 8: Confidential Mediation Statement

Rule 33-1(d) requires counsel in appeals selected for mediation to send the circuit mediator a Confidential Mediation Statement assessing the appeal before the mediation. The statement should be in compliance with the factors outlined and questions raised below, prepared in letter format, and faxed or mailed to the circuit mediator so that it is received at least two days prior to the initial mediation date. The statement is not shared with the other side and does not become part of the court file. The statement should include:

- A brief recitation of the circumstances that gave rise to the litigation. If the appeal involves procedural issues, the facts of the underlying dispute are included as well, since the purpose of the mediation process is to resolve disputes in their entirety.
- A description of any matters pending in the lower court or in any related litigation.
- Any recent developments that may impact on the resolution of the appeal.
- A history of any efforts to settle the appeal including any prior offers or demands.
- A candid assessment of the parties' respective strengths and weaknesses.
- Identification of individuals counsel believe should be directly involved in the settlement discussions.

- A description of any sensitive issues that may not be apparent from the court records but influence the settlement negotiations.
- The nature of the relationship between counsel and between the parties.
- The parties' priority of interests.
- Any suggested approaches or creative solutions for the circuit mediator to take in an attempt at settlement ("problem" to be settled, sequence of issues).
- The necessary terms in any settlement.
- Any limitations in counsel's authority to make commitments on behalf of the client.
- Any concerns about confidentiality.
- Any additional information your client or the other party needs to settle the appeal and whether it should be provided before the mediation.

PART 9: Extensions of Time to File Briefs

Mediation does not automatically stay appellate proceedings, including the briefing schedule. If counsel has a brief due and would like to request an extension of time, the circuit mediator can grant an extension for counsel if (1) all parties agree on extending the time, (2) the extension will facilitate settlement, (3) the deadline for submitting the brief has not passed, and (4) counsel has not previously filed a motion for an extension of time. Counsel should telephone the circuit mediator to make this request, and if the circuit mediator grants the extension, counsel must fax a confirmation letter to the circuit mediator, copied to all counsel, that reads as follows:

Re: [appeal number and caption]. This confirms that to facilitate settlement you have granted my unopposed request to extend the time to file the [appellant's/appellee's] brief from the current due date of [date] to the new due date of [date].

The circuit mediator will forward counsel's letter to the clerk, and the clerk will update the docket to reflect the new due date. If the circuit mediator cannot grant an extension for any of the above reasons, counsel can request an extension from the clerk or file a motion for an

extension that will be acted upon by the court (Eleventh Circuit Rule 31-2). If counsel files a motion for an extension, it should not contain any reference to the KMC or circuit mediation because the court does not know which appeals are being mediated by the circuit mediators, except when a hearing panel has referred an appeal for mediation.

PART 10: Voluntary Settlement

Because settlement is voluntary, no actions affecting the interests of any party are taken without the consent of all parties. If a settlement is reached, counsel prepare the settlement agreement, which is binding upon all parties to the agreement, and file a joint (or agreed) motion to dismiss. If the appeal does not settle, the circuit mediator declares an impasse, but negotiations can resume at any time until the appeal is terminated.

PART 11: Post-Settlement Dismissal Procedures

If the parties have reached a settlement, once they have agreed on the terms of settlement, they should file a joint (or agreed) motion to dismiss under Fed. R. App. P. 42(b) and 11th Cir. R. 42-1(a). This motion should address the following:

- Whether the dismissal pertains to all parties and claims on appeal.
- Whether the appeal is to be dismissed without prejudice (which may be granted by the clerk) or with prejudice (which must be ruled upon by a panel of three judges).
- Whether the parties are to bear their own costs or another agreed apportionment.

The motion to dismiss either should be signed by all parties or, if submitted by one party, should contain an explicit statement that all other parties to the settlement agreement consent. If submitted by only one party, the motion should be submitted by the appellant. All motions must be accompanied by a certificate of service and a certificate of interested parties. See 11th Cir. R. 27-1(a).

Settlement does *not* automatically stay any of the actions required under the rules to be timely performed, including ordering necessary transcripts and briefing. If counsel has a brief due prior to a motion to dismiss being *presented and decided*, counsel may request an extension of time to complete that action. Counsel should make the request by telephone

directly to the circuit mediator, rather than by motion, and then fax the circuit mediator a confirmation letter of the extension granted, which the circuit mediator will forward to the clerk's office. If this appeal is scheduled for oral argument, counsel should contact Matt Davidson in the court sessions unit of the clerk's office at 404-335-6131 for further direction.

PART 12: Confidentiality

Communications made during the mediation and any subsequent communications related thereto are confidential. Communications are not disclosed by any party or participant in the mediation in motions, briefs, or argument to any court or adjudicative body that might address the appeal's merits, except as necessary for enforcement of noncompliance sanctions, nor are communications disclosed to anyone not involved in the mediation or otherwise not entitled to be kept informed about the mediation by reason of a position or relationship with a party unless the written consent of each mediation participant is obtained. Counsel's motions, briefs, or argument to the court may not contain any reference to the KMC or circuit mediation. The circuit mediator's notes and counsel's Confidential Mediation Statements do not become part of the court's file. The KMC does not reveal any request by counsel for mediation without the requesting party's permission. *Ex parte* communications are also confidential except to the extent disclosure is authorized. This confidentiality applies in all mediated appeals including those referred to mediation by an active or senior judge or a hearing panel of judges.

PART 13: Noncompliance Sanctions

Mediations conducted by the circuit mediators are official court proceedings and the circuit mediators act on behalf of the court. Rule 33-1(f) imposes sanctions against any party who fails to comply with the provisions of the rule or provisions of the court's notice of mediation.

PART 14: Preparing for Effective Mediation

Approaching the Process

- Discuss with your client their goals in resolving the litigation.
- Prepare to negotiate in good faith and express your client's views on the appeal's merits as well as your client's interests.
- Obtain advance authority from your client to make those commitments as may reasonably be anticipated, keeping in mind the appeal's potential worst-case scenario in establishing this authority.
- Encourage your client to participate at every stage of the mediation process.
- Prepare thoroughly (as if you were going to a hearing or a trial) with the final goal of resolving the dispute in mind.
- Understand the rules of the court and the role of the KMC.
- Initiate informal *ex parte* contacts with the circuit mediator to discuss information that will help the circuit mediator understand the appeal and your interests.
- Consider whether a premediation session with the circuit mediator and your client would be beneficial.

The "Authority" Issue in Mediation

- If having the right person involved in the negotiation has been a problem in the past, raise the issue with the circuit mediator *before* the mediation session. The better practice is to have a clear understanding of who will be present at the mediation and what authority they will have.
- Authority by "telephone standby" may be appropriate.
- In appeals where your client is a government or institution, understand the settlement approval process that applies and discuss your concerns and timetable issues with the circuit mediator in advance.
- Understand whether the person has authority to decide or to "report and recommend" a proposed settlement to a superior.
- Have someone with "worst-case authority" present or available.

Working with the Circuit Mediator

- Follow the circuit mediator's cues. Look for two types of questions circuit mediators may ask in initial joint session: (1) What happened? (2) What do you want from the mediation (priorities, interests, results)?
- If the circuit mediator asks you to restate a point, be patient. The circuit mediator may be asking you questions to elicit information that the other party needs to hear.
- Provide the circuit mediator with legal, factual, and practical information that can be used to reality-test the other party's expectations.
- Use the circuit mediator to point out settlement options and reality-test your client's expectations. Be candid and realistic about your "worst case."
- Use the circuit mediator to suggest your proposals or to offer proposals as options "not owned by anyone."
- Confer with the circuit mediator as to how or when to make proposals or settlement offers. Consider: What is your outcome analysis? What is a fair settlement analysis (range) in light of it? Is this a reasonable move in relation to where you are going?
- Confer with the circuit mediator as to the best strategy towards closure and whether and when it is advisable to offer a "bottom-line" figure or a "best and last" proposal.
- Use the circuit mediator to guide you in ascertaining whether there are impasses that take time to work out or whether the other side is intractable and the mediation should be terminated. If you must impasse, know precisely why you have been unable to settle and what must change before impasse can be broken.
- Be patient and persistent. Each mediation has its own rhythm and pace.

The Role of Appeal Evaluation in the Mediation

- Mediation is not designed for "deciding past rights and past wrongs"--that is more suitably the role of courts and arbitration. It is designed to help parties look forward to develop solutions for problems.
- After problems have become lawsuits there is the inevitable desire by the parties and counsel to have a third-party tell them "how they are going to do" in the appeal. The circuit mediator will address that desire in such a way that does not blunt the overall objectives of mediation and unnecessarily narrow the focus but rather gives the parties

and counsel some assistance, or tools, for *them* to better evaluate their appeal. In this part of the mediation process “self realization is the best form of persuasion.”

- The circuit mediator will not predict how the court will rule in a particular appeal, but rather attempt to clarify the issues on appeal.
- The circuit mediator may discuss objective court information—how the court operates. Many times counsel have specific expectations about what they want to achieve; for example, a published opinion. The circuit mediator may discuss the probabilities of that occurring and also discuss time lines and generic reversal rates.
- The circuit mediator may discuss some of the court’s decision-making components: (1) standards of review (including Rule 36-1); (2) preservation of error; (3) waiver; (4) new issues on appeal; (5) mootness.
- The circuit mediator may discuss the various outcome options and how they may relate to the course of the litigation: (1) So what if you win? (2) So what if you lose? (3) Where is the money? (4) Does a resolution of the legal issues solve your problem? (5) Are you potentially headed for an inconclusive result?

The Elements of an Effective Initial Presentation

- A skillful initial presentation is not necessarily “conciliatory.” There is nothing wrong with stating all the reasons for settlement but at the same time communicating that you are prepared for a judicial resolution of the legal issues. The style and tone of your approach will have a substantial influence in persuading the other side to listen to you and to seriously consider what you are saying.
- Discuss the “common ground” that the parties may have in seeking to resolve the situation.
- Let your client speak if you believe it appropriate, and let your client respond directly to questions from the circuit mediator or the other side, if you are prepared to do so.
- Effectively use what you have developed in prior proceedings: prior rulings, deposition testimony, key documents, and any admissions.
- Do not use “legalese.”
- Do not give everybody in the room the impression that you, the lawyer, are the gate through which all reason must pass before a settlement will be reached.

- Do not be antagonistic to the opposing party. Save your comments on personality problems and the conduct of parties or their counsel for private caucus with the circuit mediator.
- Do not “draw a line in the dirt” in your initial presentation.
- When opposing counsel is giving their initial presentation: (1) Let them speak without argument or interruption. (2) Consider this an opportunity to learn new facts. (3) Use this as an opportunity to have the other side describe “what it really wants” in the dispute rather than restate its legal position. (4) Ascertain if the other side has a hierarchy of true interests. (5) Look for common ground. (6) Assess the other party’s weaknesses. (7) Listen carefully to what the other side is saying and even repeat back what the other side is saying to convince them that you have heard their position. (8) If a settlement proposal is made at the conclusion of the initial presentation, do not reject it out-of-hand. Given the fluid nature of many mediations, lawyers and clients may be presented with settlement possibilities (or proposals) that they had not considered at the outset.
- Work to draw your opponent to your position. (“Defeat your enemy by making him your friend.”)

Private Caucuses with Your Client and the Circuit Mediator

- Be clear about what information you expect the circuit mediator to treat as confidential.
- Ask the circuit mediator for more information about the other party’s position.
- Use this opportunity to (1) do reality checking with your client; (2) discuss expectations with your client; (3) explore your strengths and weaknesses in the appeal; (4) discuss the other party’s needs or interests; (5) discuss what information the circuit mediator can use to do “reality-testing” of other party’s expectations and position.
- Use “downtime”--when the circuit mediator is having a private caucus with the other side--to review your client’s interests in light of any new information and any historical information that may have become important and to “brainstorm” about possible solutions with your client and any co-counsel.

Mediation Don'ts

- Don't prevent the circuit mediator from talking to your client or from talking with all the parties.
- Don't be afraid to ask for a moment during the mediation to speak privately with your client.
- Don't base your settlement strategy on how well you are going to do in a particular court.
- Don't accuse the opposing party or their counsel of "bad faith" during a mediation just because their settlement posture did not live up to your expectation.
- Don't burn your bridges during mediation. Your appeal may take an unexpected turn for the worse as it develops, and you may wish to re-initiate mediation.

Further information is available through the Kinnard Mediation Center, United States Court of Appeals, Eleventh Judicial Circuit, 56 Forsyth Street, NW, #535, Atlanta, Georgia 30303, telephone 404-335-6260, fax 404-335-6270; through its Tampa office at 801 North Florida Avenue, #1030, Tampa, Florida 33602, telephone 813-301-5530, fax 813-301-5539; through its Miami office at 51 Southwest First Avenue, #1304, Miami, Florida 33130, telephone 305-714-1900, fax 305-714-1910; and on the Internet at www.ca11.uscourts.gov.